

JUL 30 1992

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

Mary M. McPhillips  
County Executive  
Orange County Government Center  
255-275 Main Street  
Goshen, New York 10924

Re: **ORDER EPA-CWA-II-92-155**  
**FINDINGS OF VIOLATION AND ORDER**

Dear Mrs. McPhillips:

The United States Environmental Protection Agency, Region II, has made a finding that Orange County is in violation of the Clean Water Act (33 U.S.C. Section 1251 *et seq*). Enclosed please find a fully executed copy of ORDER EPA-CWA-II-92-155, issued pursuant to Section 309 of the Act. Failure to comply with the enclosed ORDER may subject Orange County to civil/criminal penalties pursuant to Section 309 of the Act. Failure to comply with this ORDER may also subject the facility to ineligibility for participation in work associated with Federal contracts, grants, or loans.

If you have any questions regarding this ORDER, please contact Daniel Montella, Wetlands Section Chief, at (212) 264-5170.

Sincerely,

Richard L. Caspe, P.E.  
Director  
Water Management Division

Enclosures

cc: Robert McEwan  
Department of Law

James E. Broadway, Esq.  
Nixon, Hargrave, Devans & Doyle

bcc: M. Del Vicario, 2MWPB  
D. Montella, 2MWPB  
C. Hoffmann, 2ORC  
J. Whitney, 2ORC  
C. Mallery, USACE, NY District  
R. Manna, NYDEC - Region 3

2WM-MWPB:AUDREY MOORE:7/30/93:F:AOCULTR:WETLANDS

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION II  
26 Federal Plaza  
New York, New York 10278

-----  
In the Matter of )

County of Orange, New York )  
and Orange County Department of )  
Public Works )

Proceeding Pursuant to Section 309(a) )  
of the Clean Water Act, 33 U.S.C. )  
Section 1319(a) )  
-----

ORDER ON CONSENT  
EPA-CWA-II-92-155

The following Findings are made and Order issued pursuant to Section 309(a) of the Clean Water Act (the "Act"), 33 U.S.C. Section 1319(a), under the authority vested in the Administrator of the United States Environmental Protection Agency ("EPA") by the Act, and by him duly delegated to the Regional Administrator of the Region II Office of the EPA, which authority has been duly redelegated to the Director of the Water Management Division of the Region II Office of the EPA.

FINDINGS

1. The County of Orange, New York ("Orange County"), owns and/or controls approximately 301 acres of real property bounded on the west and south by the old channel of the Wallkill River and on the east by the Cheechunk Canal portion of the Wallkill

River, and on the north by other land and premises owned by Orange County, known as Block #1, Lot #1, in the Town of Goshen. Upon this parcel, Orange County operated and maintained the Orange County Sanitary Landfill (the "Landfill"), and constructed an expansion to the existing Landfill (the "Landfill Expansion"), together with associated roads, stormwater/sedimentation ponds and other appurtenant structures.

2. Section 301(a) of the Act, 33 U.S.C. Section 1311(a), provides in part that "Except as in compliance with this Section and Sections... 404 of the Act, the discharge of any pollutant by any person shall be unlawful." Section 301 of the CWA, 33 U.S.C. Section 1311, prohibits the filling in of wetlands of the United States except in compliance with the terms of a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. Section 1344.

3. Section 404 of the Act, 33 U.S.C. Section 1344, provides for permits for the discharge of dredged or fill materials into navigable waters.

4. The term "navigable waters" includes the waters of the United States pursuant to Section 502(7) of the Act, 33 U.S.C. Section 1362(7). The Wallkill River is a "navigable water" within the meaning of the Act.

5. The term "waters of the United States" includes wetlands adjacent to waters of the United States, as set forth at 40 CFR § 230.3(s).

6. The term "wetlands" is defined at 40 CFR § 230.3(t) to mean those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.

7. The term "pollutant" includes dredged spoil, rock, sand, cellar dirt, etc., pursuant to Section 502(6) of the Act, 33 U.S.C. Section 1362(6). Thus, discharged fill material (gravel, sand, dirt) which has been deposited in the waters of the United States constitutes "pollutants".

8. The term "discharge of a pollutant" means any addition of any pollutant to navigable waters from any point source, Section 502(12) of the Act, 33 U.S.C. § 1362(12).

9. Orange County is a "person" within the meaning of Section 502(5) of the Act, 33 U.S.C. Section 1362(5).

10. Based on hydric soil maps produced by the U.S. Soil Conservation Service, National Wetland Inventory Maps produced by the U.S. Fish and Wildlife Service, aerial photographs of the Landfill Expansion site and other relevant evidence, EPA finds that forty nine (49) acres of the parcel described in paragraph 1 are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and under normal circumstances do support, a prevalence of vegetation typically

adapted for life in saturated soil conditions. These forty nine (49) acres are defined as a "wetland" pursuant to the Act, its implementing regulations and the U.S. Army Corps of Engineers (the "Corps").

11. The wetlands portions of the parcel described in paragraphs 1 and 10 are waters of the United States.

12. Between August 1, 1989, and until mid-February 1992, Orange County discharged, or caused to be discharged, fill material consisting of soil and other material necessary for the construction of its Landfill Expansion.

13. Orange County has constructed its two-phase Landfill Expansion on property adjacent to the Landfill and the Wallkill River. Specifically, the purpose of this project, which placed fill in federally regulated wetlands, was to construct a separate expansion to the existing Landfill pursuant to a permit from New York State Department of Environmental Conservation ("NYSDEC") issued under the applicable State solid waste management regulations. Orange County's unpermitted discharge of fill material into the forty nine (49) acres of wetlands consisted of the construction of two new cells in the wetlands. Phase I involved the construction of Cell One, which has seven subcells. Orange County estimates Cell One has a life of approximately one year. Phase II involves the construction of Cell Two, which has seven subcells. Orange County estimates Cell Two also has a life of approximately one year. Orange County asserts that deposition

of fill material associated with the construction of phase I of the Landfill expansion began in August 1989 and continued through December 1990, with a suspension of work between December 30, 1989 and March 26, 1990 for the winter season. Fill placement in phase II of the Landfill expansion began in January 1991 and continued through February 1992. The phase II project is not completed, and work involving the placement of fill material may recommence only in accordance with Ordered Provision 8B below.

14. Section 404 of the CWA, 33 U.S.C. Section 1344, authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue permits for the discharge of fill material into navigable waters.

15. At the time of the construction of Cells One and Two in the wetlands, and continuing until Orange County asserts it ceased construction activity, no permit has been issued pursuant to Section 404 of the CWA, 33 U.S.C. Section 1344, to Orange County authorizing the discharge of fill material into the wetlands identified in paragraph 10 above.

16. Subsequent to EPA's site visit on December 12, 1991, but prior to EPA's Section 308 inquiry of February 6, 1992, Orange County engaged a consultant to determine the extent of any federally regulated wetlands in the Landfill Expansion area. Orange County asserts it has since ceased all construction activities at the Landfill Expansion and announced in its 308 response that it will not place waste into the Phase I area of

the Landfill Expansion until all issues regarding federally regulated wetlands are resolved with the appropriate federal agencies.

17. Without admitting or denying EPA's finding as to the area of the wetlands affected, Orange County agrees that solely for the purposes of this Order, forty nine (49) acres is the area of regulated wetlands filled by the Landfill Expansion and associated activities.

18. Presently, Orange County does not have and has not applied for a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. Section 1344, by the Secretary of the U.S. Army Corps of Engineers (the "Corps") for the filling in of the wetlands. Therefore, pursuant to Section 301 of the CWA, 33 U.S.C. Section 1311, Orange County's unpermitted discharge of fill material into the forty nine (49) acres of wetlands is unlawful.

#### ORDERED PROVISIONS

Upon consideration of the Findings, the seriousness of the violation, any good faith efforts to comply with the Act, and the consent of Orange County, and pursuant to the provisions of Section 309(a) of the Act, 33 U.S.C. Section 1319(a), the EPA has determined that compliance with the following requirements is reasonable.

It is hereby ORDERED that:



1. In lieu of on-site remediation of the Landfill, Orange County shall complete and submit to EPA an EPA approved 2:1 value-for-value Conceptual Mitigation Proposal within fifty (50) days of receipt of this fully executed Order. Orange County's Conceptual Mitigation Proposal shall include the County's proposed mitigation approach and a wetlands functional assessment, i.e., an evaluation of the functions associated with the wetlands filled by the Landfill Expansion and the values associated with those functions. In developing its Conceptual Mitigation Proposal, Orange County shall review the Corps' Wetlands Evaluation Technique Manual for guidance in determining the functions associated with the wetlands filled by the Landfill Expansion and the values associated with those functions. Said Conceptual Mitigation Proposal shall be approved by EPA. Orange County shall submit its proposed Conceptual Mitigation Proposal to EPA by the 30th day following its receipt of this fully executed Order.

2. Orange County will, within one hundred (100) days of receipt of this fully executed Order, have identified and obtained EPA's approval of potential mitigation site(s), not necessarily contiguous, within the Wallkill River Basin, for the purpose of creation of or enhancement into "higher value" wetlands in accordance with Ordered Provision 1 above (the "mitigation site(s)") and as defined by the Federal Manual for Identifying and Delineating Jurisdictional Wetlands, issued in 1989. The acreage of wetland need not be in one site, but if

more than one site is to be used, each site must be at least twenty five (25) acres in size. EPA, upon Orange County's request and in its absolute and sole discretion, may accept a mitigation site which is less than twenty five (25) acres in size. Acceptance of mitigation site location(s) will be contingent upon EPA inspection and approval. Orange County shall submit its proposed mitigation site(s) to EPA by the 80th day following receipt of this fully executed Order.

3. In addition, within one hundred and sixty five (165) days of receipt of this fully executed Order, Orange County shall complete and submit to EPA, an EPA approved Wetland Functional Assessment ("WFA") of the EPA approved mitigation site(s). Orange County shall review the Corps' Wetland Evaluation Technique manual for guidance (see Ordered Provision 1). Finalization of any mitigation site(s) and wetland functional assessments shall be contingent upon EPA inspection and approval. Orange County shall submit its proposed WFA to EPA by the 145th day following its receipt of this fully executed Order.

4. Orange County shall, within two hundred and twenty (220) days of receipt of this fully executed Order on Consent, obtain control or ownership of the approved mitigation site(s), and shall have concluded all eminent domain proceedings necessary to obtain control or ownership of the approved mitigation site(s). Orange County shall ensure that the mitigation site(s) approved for conversion to higher value wetlands shall remain preserved as

permanent wetlands. Actions to be taken by Orange County to so ensure this preservation shall be proposed to EPA for its review and approval when the mitigation site(s) is (are) submitted to EPA for approval pursuant to Ordered Provision 2 above. Orange County must submit the necessary written verification, including deed restrictions, to EPA prior to conducting any work. In the event Orange County already owns or has control of one or more of the approved mitigation site(s), the two hundred and twenty (220) day period stipulated in this Ordered Provision shall not apply as to that site or sites.

5. Within two hundred and fifteen (215) days of receipt of this duly executed Order, Orange County shall develop and submit an EPA approved Detailed Mitigation Plan to EPA for each approved mitigation site. Finalization of any mitigation plan shall be contingent upon EPA inspection and approval. Orange County shall submit its proposed detailed mitigation plan to EPA by the 195th day following its receipt of this fully executed Order. To ensure that the mitigation plan will adequately compensate for the loss of wetlands resulting from project construction, the Final Mitigation Plan shall include the following items:

- A. identification, on a scaled drawing, of the density and distribution of species to be planted or seeded. The height of the trees and shrubs to be planted on the creation site shall also be provided.
- B. a statement that Orange County shall be responsible for

maintaining an 85% survival rate after one growing season, and that Orange County shall be responsible for all replanting, regrading, and/or restructuring necessary to achieve this survival rate. EPA recommends that this success rate be maintained for at least three years for planting of herbaceous vegetation, and no less than five years for woody vegetation.

- C. a provision that Orange County will monitor the site for five years, and will prepare a yearly report and submit it to the EPA, with a copy furnished to the Corps, by September 15 of each year. The report shall include photographs and indicate the existing conditions and survival rate of the plants, as well as the quantity of replanting and descriptions of restructuring or regrading necessary to achieve 85% survival.
- D. a statement that Orange County will guarantee that the mitigation area will be held as open space in perpetuity, through title transfer, deed restrictions, or conservation easements ("documents"), together with copies of all relevant executed documents shall be transmitted to both EPA and the Corps.

6. If, within two hundred and twenty (220) days of receipt of this fully executed Order on Consent, Orange County has failed to identify and receive EPA approvals of mitigation site(s) and Detailed Mitigation Plan, Orange County shall immediately submit

an Alternative Mitigation Plan to EPA. EPA retains the right to reject any proposed alternative option if not in compliance with Section 404 of the Act, 33 U.S.C. Section 1344, and in such an instance, EPA reserves all of its rights and remedies, including, but not limited to, the right to require removal of the forty nine (49) acres of fill placed on the parcel and/or to order Orange County to cease and desist its operation and use of the Landfill Expansion.

7.A. Orange County shall complete all work identified in the Detailed Mitigation Plan(s) within one year and one month of its receipt of this fully executed Order, except that the monitoring reports and 85% survival rate level must be maintained in accordance with Ordered Provision 5 above.

7.B. Orange County is authorized to recommence a phased operational use of the Landfill Expansion as follows:

Orange County shall commence use of the initial Cell of the Landfill Expansion as directed in its NYSDEC Operating Permit only upon the County's receipt of this fully executed Order and EPA's receipt of Orange County's notification that it has obtained the requisite NYSDEC approvals (the "start-up date").

Orange County shall notify EPA at least fourteen days in advance of the date it expects to move into each subsequent Cell of the Landfill Expansion, and shall not commence using the next Cell if EPA notifies Orange County that it has failed to

complete any obligation identified in this Order or that it has otherwise violated the terms and conditions of this Order.

Notwithstanding the periodic evaluation of Orange County's compliance with this Order outlined in the two previous paragraphs, if at any time, Orange County fails to complete any obligation identified in this Order or otherwise violates the terms and conditions of this Order, and EPA has not granted Orange County an extension of time pursuant to Ordered Provision 8 below, Orange County shall immediately cease and desist its phased operation and use of the Landfill Expansion, and shall not be authorized to recommence or proceed into the next phase unless and until Orange County cures the violation(s) to EPA's satisfaction, and EPA authorizes Orange County to recommence operation.

If, at the end of the one year and one month period described in Ordered Provision 7.A. above, Orange County has failed to complete all work identified in the Detailed Mitigation Plan(s), and EPA has not granted Orange County an extension of time pursuant to Ordered Provision 8 below, Orange County shall immediately cease and desist its operation and use of the Landfill Expansion. EPA reserves all of its rights and remedies in such event.

8. If any event occurs which causes a delay in compliance with any of the requirements of this Order on Consent, Orange County shall promptly notify EPA by facsimile and shall, within seven (7) days of such notification, notify EPA in writing of the

anticipated length and cause of the delay, the measures taken by Orange County to prevent or minimize the delay, and the timetable by which Orange County intends to implement these measures. Orange County shall adopt all reasonable measures to avoid or minimize the violation. If EPA agrees that the delay or anticipated delay has been or will be caused by circumstances beyond the reasonable control of Orange County, such as an Act of God, the time for performance hereunder may be extended, in the sole discretion of EPA, for a reasonable period not to exceed the period of actual delay resulting from such event. Unanticipated or increased costs or expenses associated with the implementation of this Order on Consent, changed economic circumstances or technical problems, inability to obtain necessary permits or approvals shall not constitute force majeure. Orange County acknowledges and agrees that all third parties contracted to implement the provisions of this Order shall be bound by the terms and conditions of this Order. Any extension granted by EPA, which EPA determines was caused by a force majeure event, will not automatically result in an extension of any subsequent compliance date. Orange County must make an individual showing of proof as to each delay or other requirement for which an extension is sought.


This ORDER in no way limits the authority of the Secretary of the Army, acting through the Chief of Engineers, to issue, to deny, or to specify any conditions in any permit, or to otherwise carry out his functions relating to the issuance of permits for



the discharge of dredged or fill material under Section 404 of the Act.


This ORDER does not constitute a waiver from compliance or modification of the Act. This ORDER is an enforcement action taken by EPA to ensure swift compliance with Act.

Dated: 7/30/92

Signed:   
Richard L. Caspe, P.E.  
Director  
Water Management Division

Orange County consents to the issuance of the above Order on Consent.

Dated: 7/13/92

Signed:   
Mary McPhillips  
County Executive  
County of Orange  
County Government Center  
Goshen, New York 10924